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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 571

W. F. COEN, PETITIONER,

VS.

AMERICAN SURETY COMPANY OF NEW YORK, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No._____.

W. F. COEN, PETITIONER,

VS.

AMERICAN SURETY COMPANY OF NEW YORK, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, W. F. Coen, alleges and respectfully shows to this Honorable Court, as follows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On or about March 5, 1935, F. E. Colvin and W. B. DeArmond called at petitioner's office in Kansas City, Missouri, and inquired of petitioner if he would be interested in purchasing, at a discount, a note secured by tax bills of Henderson County, North Carolina (R. 34, 35). They were told by petitioner, after some discussion, that he was not familiar with North Carolina tax bills and that he would not be interested (R. 35).

Shortly thereafter, they returned to petitioner's office, and inquired of petitioner if he would be interested in purchasing the note if its payment should be guaranteed by a reliable surety company (R. 36). To this inquiry, petitioner replied that if the guaranty was provided by a good surety company, he would be interested in purchasing the note (R. 36).

Later a Mr. Bowers was brought into petitioner's office by Mr. Colvin and Mr. DeArmond and the former was introduced to petitioner as a member of the firm of Gem City Finance Company, Inc., of North Carolina, which was represented as the firm whose note was to be sold, and Mr. Bowers represented to petitioner that he could, without difficulty, obtain the guaranty of American Surety Company of New York through his acquaintance with a Mr. Nye, who, he represented, was an agent of the surety company in another territory (R. 37).

The note in question was dated March 14, 1935, was in the principal amount of $3,500, due ninety days from date with interest at the legal rate allowed by law, was payable to the order of F. E. Colvin, and was purportedly signed by Gem City Finance Company, Inc., by W. Erdman Love, President, attested by J. B. Bowers, Secretary and Treasurer, and it bore what purported to be the cor-

porate seal of said Gem City Finance Company, Inc. (R. 41, Exh. 1).

After several visits to petitioner's office, Mr. Colvin and Mr. DeArmond exhibited to petitioner a form of guaranty bond which they said would be given to guarantee payment of the note. Petitioner took the form of bond to his attorney, who made some changes, and it was then returned to Mr. Colvin and Mr. DeArmond, and they were told by petitioner that if they could arrange for American Surety Company of New York to execute the bond in substantially that form, he would consider the purchase of the note (R. 36).

Approximately ten days later, Mr. Colvin, Mr. DeArmond and Mr. Bowers submitted to appellant the bond which they intended to give as a guaranty of the note (R. 37-38). At the head of it there was printed "American Surety Company of New York, N. Y." It was in the principal amount of $3,500 and was conditioned, in substance, that if Gem City Finance Company, Inc., should pay to F. E. Colvin, or his assigns, the sum of $3,500, with interest on or before June 14, 1935, the bond would be void; but that if said Gem City Finance Company, Inc., should default in the payment of its said note, said F. E. Colvin, or his assigns, should be reimbursed by American Surety Company of New York in the amount of $3,500, together with expenses incurred in the collection of the note. The bond was purportedly signed by "American Surety Company of New York, N. Y., by L. Bert Nye, General Agent and Attorney in Fact" (R. 59-63, Exh. 2).

Petitioner was unwilling to release the money in payment for the note until after he had received from the home office of respondent a letter confirming the bond. He, therefore, required of Mr. Colvin, Mr. DeArmond and Mr. Bowers that they secure a letter of confirmation of the bond from respondent's home office (R. 47, 49, 81, 91, 92).

Thereafter, Mr. Colvin and Mr. DeArmond deposited the bond in the trust department of the First National Bank of Kansas City, and petitioner deposited a cashier's draft in the amount of $3,000, in pursuance of an escrow agreement executed by petitioner, Mr. Colvin, Mr. DeArmond and the First National Bank of Kansas City, in which the bank, as escrow agent, upon receiving direct advice from American Surety Company of New York that the bond was authorized, and that it recognized its responsibility thereunder, was directed to issue a cashier's draft for $2,500 payable to V. B. Bowers, Jr., and a cashier's draft to W. B. DeArmond for $500 and to deliver to petitioner the note and the guaranty bond. The escrow agreement provided that the escrow agent should not act upon any authorization received from American Surety Company of New York until after such authorization had been approved by petitioner (R. 84, 85, Exh. 5).

Before entering into the escrow arrangement described in the preceding paragraph, petitioner had sent a telegram to respondent at its home office in New York, which was as follows (R. 45, Exh. 3):

> "Has Bert Nye your company power to execute guaranty bond and where. Wire collect Western Union."

Respondent answered, by wire, as follows (R. 46, Exh. 4, 67):

> "L Bert Nye is our manager Washington D C and has power to execute bonds within certain limitations. If further information desired suggest you see W R Evans our manager your city."

After receipt of respondent's telegram, petitioner went to respondent's Kansas City office and there conferred with Mr. Evans. He told Mr. Evans the facts known to him concerning the note and the proposal to give the guaranty bond, showed Mr. Evans the telegram

that had been received from the home office of respondent and, after some conversation in respect to the transaction, Mr. Evans said to petitioner, "I know Bert Nye's signature, and when that bond arrives here in Kansas City I can tell you when I see the bond, I can tell you beyond any doubt whatsoever as to whether or not it is a genuine bond" (R. 47).

Petitioner then told Mr. Evans that he would rely entirely upon his confirmation of the bond and that he wanted him to go with him to the First National Bank after the letter of confirmation had arrived and tell him if the guaranty bond was the valid obligation of respondent (R. 47).

Shortly afterward, petitioner was notified by the bank that a copy of the letter from respondent confirming the bond had been received (R. 49). Petitioner had received, by air mail, the original of this letter. It was written upon what appeared to be the stationery of respondent, was addressed to petitioner, and it stated, in substance, that the bond was confirmed (R. 53, Exh. 6). It was purportedly signed by "H. A. Reiss, Assistant Superintendent of Agencies" of respondent (R. *Id.*).

Afterward, petitioner, accompanied by Mr. Evans, went to the trust department of the First National Bank of Kansas City. At this meeting, Mr. Fred S. Riley, Assistant Trust Officer of the First National Bank, exhibited to Mr. Evans the guaranty bond and the letter which was purportedly from the home office of respondent, and Mr. Evans, after having examined these documents, assured petitioner that the letter confirming the bond had come from respondent's home office in New York; that the bond was valid and represented the binding obligation of respondent; and that it was "like money on the barrel-head" (R. 52, 103).

Thereafter, the bank executed the escrow agreement by delivering $2,500 to Mr. Bowers, $500 to Mr. DeAr-

mond, and by delivering to petitioner the note and guaranty bond.

At the maturity of the note, it was not paid, and petitioner demanded that respondent make good its guaranty (R. 80). It declined liability under the guaranty bond on the ground that it was a forgery. Thereafter, suit was instituted by petitioner in the Circuit Court of Jackson County, Missouri, at Kansas City, and petitioner, as plaintiff in that action, suffered an involuntary non-suit (R. 140), and, thereafter, instituted the instant action in the United States District Court for the Western Division of the Western District of Missouri to recover on the guaranty bond.

Respondent pleaded in its answer, and produced substantial evidence to show, that the note purchased by petitioner (R. 153-155), the guaranty bond (R. 141-151) and the letter purporting to have come from respondent's home office as confirmation of the bond (R. 156-159) were forgeries.

Respondent's evidence in respect to the genuineness of the signature on the guaranty bond consisted of, among other things, a specimen of the signature of L. Bert Nye and an impression of respondent's corporate seal (R. 147, Def. Exh. 5).

Petitioner, in his reply, denied respondent's allegations of forgery and pleaded that by reason of the facts detailed above, respondent was estopped to assert the invalidity of the guaranty bond (R. 11).

At the close of petitioner's evidence, the District Judge, being of the opinion that Mr. Evans, Manager of respondent's branch office at Kansas City, was without authority to confirm the bond in behalf of respondent (R. 113-123), sustained respondent's motions to strike (1) the testimony of petitioner of statements made by Mr. Evans in respect to the genuineness of the bond and the confirmation letter (R. 109, 110), and (2) similar tes-

timony given by the witness Fred S. Riley, Trust Officer of the First National Bank of Kansas City (R. 110, 111), and denied respondent's motion to strike from the record the guaranty bond and the purported letter of confirmation (R. 109, 129).

At the close of all the evidence, the District Judge sustained respondent's motion for a directed verdict (R. 188) and entered judgment for respondent (R. 19). On appeal to the United States Circuit Court of Appeals for the Eighth Circuit, the judgment of the District Court was affirmed (R. 225). Judge Thomas delivered the opinion of the Circuit Court of Appeals, which was concurred in by Judge Sanborn (R. 206-221). Judge Gardner filed a separate dissenting opinion (R. 221).

The Circuit Court of Appeals, affirming the judgment of the District Court, held (a) that under the evidence presented, W. R. Evans, Manager of respondent's office in Kansas City, Missouri, was without authority to confirm the validity of the guaranty bond for and in behalf of respondent; (b) that, accordingly, his declarations made in respect to the validity of the guaranty bond were inadmissible in evidence and were properly stricken from the record by the District Judge; (c) that the introduction into evidence of the genuine signature of L. Bert Nye, the purported signer of the guaranty bond, did not present a question for the jury in respect to the validity of the guaranty bond for the reason that delivery of the guaranty bond by respondent was not shown; and (d) that notwithstanding the provisions of Rule 8(c) of the Federal Rules of Civil Procedure, the burden was upon petitioner to prove execution and delivery of the guaranty bond and that he had failed to sustain the burden.

II.

JURISDICTION.

(a) The jurisdiction of this Court is invoked by petition for writ of certiorari under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925 (Title 28, United States Code Annotated, Section 347(a)).

(b) The judgment of the District Court was rendered January 31, 1940 (R. 19). Appellant's motion for new trial was overruled by the District Court on July 9, 1940 (R. 21). The opinion and judgment of the Circuit Court of Appeals, affirming the judgment of the District Court, was rendered June 9, 1941 (R. 206). Appellant's motion for rehearing was filed in the Circuit Court of Appeals on June 24, 1941 (R. 227-231), and was denied on July 3, 1941 (R. 233). Upon motion of appellant (R. 233), the mandate of the Circuit Court of Appeals was stayed for a period of sixty days from July 17, 1941 (R. 234), to allow petitioner sufficient time within which to file its petition for writ of certiorari in this Court.

(c) The nature of the case is sufficiently shown in the "Summary Statement of the Matter Involved," *ante*, and for sake of brevity, a separate statement here is omitted.

(d) Cases believed to sustain the jurisdiction of the Court are *Gay* v. *Ruff*, 292 U. S. 25; *Spiller* v. *Atchison, Topeka & Santa Fe Railway Company*, 253 U. S. 117; *Ruhlin et al.* v. *New York Life Insurance Company*, 304 U. S. 202; *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.

III.

THE QUESTION PRESENTED.

The question presented for determination is whether, under controlling decisions of the Supreme Court of Missouri, the Circuit Court of Appeals erred in holding (a) that W. R. Evans, Manager of respondent's Kansas City office, was without authority to confirm the validity of the guaranty bond for, and in behalf of, respondent; (b) that the declarations made by Mr. Evans in respect to the validity of the guaranty bond were inadmissible because violative of the hearsay rule, and (c) that the evidence was insufficient to show execution of the guaranty bond by respondent.

The case presents the further question of whether the Circuit Court of Appeals, under the provisions of Rule 8(c) of the Federal Rules of Civil Procedure, erred in holding that the burden lay upon petitioner to prove that the guaranty bond was not a forgery.

IV.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

(a) The Circuit Court of Appeals, by holding that W. R. Evans, Manager of respondent's office in Kansas City, Missouri, was without authority to confirm the validity of the guaranty bond for and in behalf of respondent, decided an important question of local law in a manner in direct conflict with the case of *James H. Forbes Tea & Coffee Co.* v. *Baltimore Bank,* 345 Mo. 1151, the most recent decision of the Supreme Court of Missouri in respect to the actual and implied authority of the manager of a branch office of a corporation conducting its business in Missouri.

(b) The Circuit Court of Appeals, by holding that the declarations of W. R. Evans, respondent's Kansas City manager, were inadmissible in evidence because violative of the hearsay rule, decided an important question of local law in a manner in direct conflict with controlling decisions of the Supreme Court of Missouri in the cases of *Shelton* v. *Wolf Cheese Co.*, 338 Mo. 1129; *Whittington* v. *Westport Hotel Operating Co.*, 326 Mo. 1117; *Philibert* v. *Benjamin Ansehl Co.*, 342 Mo. 1239; *Simpson Adv. Service Co.* v. *Manufacturers & Merchants Ass'n*, 330 Mo. 1049; and *State* v. *Armour Packing Co.*, 173 Mo. 356.

(c) The Circuit Court of Appeals, by holding that the introduction into evidence by respondent of the genuine signature of L. Bert Nye did not show *prima facie* the genuineness of the guaranty bond, decided an important question of local law in a manner (1) in direct conflict with controlling decisions of the Supreme Court of Missouri in the cases of *Sanders* v. *North End Building & Loan Ass'n*, 178 Mo. 674; *State* v. *Thompson*, 141 Mo. 408; and *State* v. *Pace*, 269 Mo. 682, (2) in conflict with, and violative of, Section 1751, Missouri Revised Statutes, 1929, and (3) in conflict with, and violative of, the federal statute in respect to proof of disputed writings (28 United States Code Annotated, Section 638).

(d) The Circuit Court of Appeals, by holding that the burden of proof lay upon petitioner to prove that the guaranty bond was not a forgery, decided an important procedural question in a manner violative of the provisions of Rule 8(c) of the Federal Rules of Civil Procedure.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and over the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify to and send to this Court, for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case entitled on its docket "*W. F. Coen,*

Appellant, v. *American Surety Company of New York, a corporation, Appellee, No.* 11881," and that the judgment of said United States Circuit Court of Appeals for the Eighth Circuit may be reviewed by this Honorable Court, and that petitioner may have such other and further relief in the premises as to this Honorable Court shall seem appropriate, and petitioner will ever pray, etc.

W. F. Coen,
Petitioner.

By: John T Hudson
D A Murphy
Attorneys for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1941.

No.....

W. F. COEN, PETITIONER,

VS.

AMERICAN SURETY COMPANY OF NEW YORK, A CORPORATION, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is reported in Volume 120, Federal Reporter, Second Series, at page 393, and appears in the record at pages 206 to 225. The District Judge, upon overruling petitioner's Motion for New Trial, delivered a memorandum opinion which is set forth at page 192 of the record.

II.

STATEMENT OF THE CASE.

Under the heading "Summary Statement of the Matter Involved" in the petition, *ante*, is a statement of the case in sufficient detail for the purposes here involved, and, in the interest of brevity, the statement is not here repeated.

III.

SPECIFICATION OF ERRORS.

(a) The Ciruit Court of Appeals erred in holding that under the evidence W. R. Evans, Manager of respondent's Kansas City, Missouri, office, was without authority to confirm the validity of the guaranty bond for and in behalf of respondent, and by so holding, the Circuit Court of Appeals decided an important question of local law in a manner in direct conflict with the decision of the Supreme Court of Missouri in the case of *James H. Forbes Tea & Coffee Co.* v. *Baltimore Bank,* 345 Mo. 1151.

(b) The Circuit Court of Appeals erred in holding that the declarations of W. R. Evans, Manager of respondent's office in Kansas City, Missouri, were inadmissible because violative of the hearsay rule, and by so holding, the Circuit Court of Appeals decided an important question of local law in a manner in direct conflict with controlling decisions of the Supreme Court of Missouri in the cases of *Shelton* v. *Wolf Cheese Co.,* 338 Mo. 1129; *Whittington* v. *Westport Hotel Operating Co.,* 326 Mo. 1117; *Philibert* v. *Benjamin Ansehl Co.,* 342 Mo. 1239; *Simpson Adv. Service Co.* v. *Manufacturers & Merchants Ass'n,* 330 Mo. 1049; and *State* v. *Armour Packing Co.,* 173 Mo. 356.

(c) The Circuit Court of Appeals erred in holding that the introduction into evidence by respondent of the genuine signature of L. Bert Nye, the person who pur-

portedly signed the guaranty bond, did not present a question for the jury in respect to the genuineness of said guaranty bond, and by so holding the Circuit Court of Appeals decided an important question of local law in a manner in direct conflict with controlling decisions of the Supreme Court of Missouri in the cases of *Sanders* v. *North End Building & Loan Ass'n,* 178 Mo. 674; *State* v. *Thompson,* 141 Mo. 408; and *State* v. *Pace,* 269 Mo. 682, and in conflict with, and in violation of, the provisions of Section 1751, Missouri Revised Statutes, 1929, and rendered a decision violative of the federal statute in respect to proof of disputed writings (28 United States Code Annotated, Section 638).

(d) The Circuit Court of Appeals erred in holding that the burden of proof lay upon petitioner to prove the genuineness of the guaranty bond and, by so holding, rendered an opinion in conflict with, and in violation of, the provisions of Rule 8(c) of the Federal Rules of Civil Procedure.

IV.

SUMMARY OF ARGUMENT.

(a) The question presented involves the rights of the parties under a guaranty bond alleged to have been delivered in Missouri, to a resident of that state, and the controversy arises out of transactions occurring in Missouri. It is, therefore, a question of local law to be determined by applicable local decisions.

Ruhlin v. *New York Life Insurance Company,* 304 U. S. 202.

Erie Railroad Co. v. *Tompkins,* 304 U. S. 64.

(b) Under the law of Missouri, as announced by the highest court of that state, W. R. Evans, Manager of respondent's office in Kansas City, Missouri, had author-

ity, express or implied, to confirm the validity of the guaranty bond for and in behalf of respondent. Indeed, the record shows that respondent recognized that he possessed such authority.

James H. Forbes Tea & Coffee Company v. *Baltimore Bank*, 345 Mo. 1151.

Kelso v. *Lincoln National Life Ins. Co.*, 227 Mo. App. 184.

State v. *Hemenover*, 188 Mo. 381.

Thompson v. *Insurance Co.*, 169 Mo. 12.

James v. *Mutual Reserve Ins. Co.*, 148 Mo. 1.

Springfield Steam Laundry Co. v. *Traders' Ins. Co.*, 151 Mo. 90.

Bacon Piano Co. v. *Metcalf Jewelry & Music Co.*, 225 Mo. App. 463.

Buffalo Trust Co. v. *Producers' Exchange No. 148, California, Mo.*, 224 Mo. App. 199.

Robinson v. *Moark-Nemo, etc., Mining Co.*, 178 Mo. App. 531, 539.

Concrete & Steel Construction Co. v. *National Asphalt Refining Co.*, (Mo. App.) 2 S. W. 2d 157.

Farm & Home Savings & Loan Ass'n v. *Stubbs*, 231 Mo. App. 87.

(c) Under the law of Missouri, as announced by the highest court of that state, the declarations of W. R. Evans, Manager of respondent's Kansas City office, were admissible in evidence as proof of the execution of the guaranty bond by respondent and were not violative of the hearsay rule.

Shelton v. *Wolf Cheese Co.*, 338 Mo. 1129.

State v. *Armour Packing Co.*, 173 Mo. 356.

Whittington v. *Westport Hotel Operating Co.*, 326 Mo. 1117.

Philibert v. *Benjamin Ansehl Co.*, 342 Mo. 1239.

Green v. *American Life & Accident Ins. Co.*, (Mo. App.) 93 S. W. 2d 1119.

Simpson Advertising Service Co. v. *Manufacturers & Merchants Ass'n*, 330 Mo. 1049.

(d) Under the Missouri law, as well as the federal statutes, the introduction into evidence by respondent of a specimen of the genuine signature of L. Bert Nye required submission of the case to the jury.

Sec. 1751, Mo. R. S., 1929, Title 28, United States Code Annotated, Sec. 638.

Sanders v. *North End Building & Loan Ass'n*, 178 Mo. 674.

State v. *Pace*, 269 Mo. 682.

State v. *Thompson*, 141 Mo. 408.

(e) The Circuit Court of Appeals erred in holding that the burden of proof lay upon petitioner to prove the execution and delivery of the guaranty bond by respondent.

Federal Rules of Civil Procedure, Rule 8(c).

Fort Dodge Hotel Company v. *Bartelt*, (8th Cir.) 119 F. 2d 253.

Lampe v. *Franklin American Trust Co.*, 339 Mo. 361.

State ex rel. City of Maplewood v. *Southern Surety Co.*, 323 Mo. 150.

Campbell v. *Terminal R. Ass'n of St. Louis*, 126 S. W. 2d 915.

Cluck v. *Abe*, 328 Mo. 81.

Connole v. *E. St. Louis & S. Ry. Co.*, 340 Mo. 690.

State ex rel. Stevens v. *Arnold*, 326 Mo. 32.

McCloskey v. *Koplar*, 329 Mo. 527.

Clapper v. *Larkin*, 343 Mo. 710.

Downs v. *Horton*, 287 Mo. 414.

Bond v. *St. Louis-San Francisco Ry. Co.*, 315 Mo. 987.

(f) The decision of the Circuit Court of Appeals, if allowed to stand, would render the branch office system impractical in that local patrons could not rely upon the apparent authority of the manager, especially in respect to transactions arising outside the territory served by the office committed to his management.

V.

ARGUMENT.

(a)

The Question Presented Is One of Local Law.

The guaranty bond alleged to have been executed and delivered by respondent was acquired by petitioner in Missouri as a part of a transaction which occurred in that state. The jurisdiction of the District Court was based entirely upon diversity of citizenship between the parties with the requisite jurisdictional amount in controversy. The question presented is, therefore, one of local law to be determined by applicable local decisions. *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64; *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202.

(b)

Under the Law of Missouri, W. R. Evans, As Manager of Respondent's Kansas City Office, Had Authority to Confirm the Validity of the Guaranty Bond.

On February 21, 1940, the Supreme Court of Missouri decided the case of *James H. Forbes Tea & Coffee Co.* v. *Baltimore Bank*, 345 Mo. 1151.

In that case, the facts briefly stated were that the appellant, James H. Forbes Tea & Coffee Company, a well-known importer of tea, coffee and spices, with its principal office in St. Louis, Missouri, and branch offices and warehouses in Kansas City, Missouri, and Omaha, Nebraska, had Fred Einhorn as manager of its Kansas City branch office.

On November 8, 1932, Einhorn presented to respondent, the Baltimore Bank in Kansas City, for deposit to his personal account, a check payable to appellant from the Rutherford Chile Company. A conversation took

place between Einhorn and the officers of the respondent bank when he offered the check for deposit, and two days later he procured from appellant's home office an instrument in respect to his authority, and presented it to respondent.[1] As time went on, Einhorn deposited to his personal account 174 checks payable to appellant, which totalled $41,675.80, and at various times sent to appellant his personal checks drawn on the respondent bank which aggregated at least $10,648.07.

After it had been discovered that Einhorn was short in his accounts, appellant collected $20,000 from the bonding company which wrote the fidelity bond on Einhorn, and then sued the respondent bank for conversion of 174 checks, aggregating $41,675.80.

The Supreme Court of Missouri held that appellant could not recover because Einhorn, as manager of appellant's office at Kansas City, had apparent, if not actual, authority to receive payment of checks made payable to

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[1]The instrument which Einhorn delivered to the bank was as follows:

"Jas H. Forbes Tea & Coffee Company, St. Louis-Omaha-Kansas City, 908 to 926 Clark Avenue, Saint Louis. November 10, 1932. To Whom It May Concern:

"This is to certify that Mr. Fred Einhorn, a resident of Kansas City, Mo., is authorized to receive payment of accounts due the Jas. H. Forbes Tea & Coffee Co., a Missouri corporation, with headquarters in St. Louis, Mo., and a branch office and warehouse at 302 Delaware St., Kansas City, Mo. It is further certified that Mr. Fred Einhorn is the Manager of the foregoing company's branch office and warehouse in Kansas City, Mo. Jas. H. Forbes Tea & Coffee Co., Herbert H. Droste, Secy.-Treas.

"Before me, a notary public in and for the City of St. Louis, on this day personally appeared Herbert H. Droste, who being by me duly sworn, upon oath says he is Secretary and Treasurer of the Jas. H. Forbes Tea & Coffee Co., a Missouri corporation. Herbert H. Droste. Subscribed and sworn to before me this 10th day of November, 1932. Hilma A. Barthel, Notary Public. (Seal) My commission expires January 7, 1935."

appellant and affirmed the ruling of the trial court sustaining a demurrer to the evidence.

In the course of the opinion it was said:

> *"The rule is well settled that 'a manager of a company possesses the most general and inclusive powers possessed by any officer of a corporation, and that unless his authority is specifically restricted it is coextensive with the powers of the corporation itself, and he has authority to do any act in its behalf which is usual and necessary in the ordinary course of the company's business, or which he is held out to the public as having authority to do.* The fact that he occupies the position of manager implies his authority to do anything that the corporation itself may do, so long as the act done pertains to the ordinary business of the corporation. 14A C. J., p. 359, Sec. 2221; *Robinson* v. *Moark-Nemo Consolidated Mining Co.*, 178 Mo. App. 531, 539, 163 S. W. 885; *Concrete & Steel Const. Co.* v. *National Asphalt Refining Co.*, (Mo. App.) 2 S. W. 2d 157.' *Buffalo Trust Co.* v. *Producers' Exchange*, 224 Mo. App. 199, l. c. 208, 23 S. W. 2d 644, l. c. 649. See, also, *Gate City Building & Loan Ass'n* v. *National Bank of Commerce*, 126 Mo. 82, 28 S. W. 633, 27 L. R. A. 401, 47 Am. St. Rep. 633; *Farm & Home Savings & Loan Ass'n of Missouri* v. *Stubbs*, 231 Mo. App. 87, 98 S. W. 2d 320; *Rosenbaum* v. *Gilliam*, 101 Mo. App. 126, 74 S. W. 507" (Italics ours).

Further in the opinion it was said:

> "As previously stated, the Kansas City customers of appellant dealt only with that branch office; merchandise was sent to it and then later sold to the customers, the same as if it had been an independent jobber."

And, still further in the opinion, it was said:

> "Where a corporation puts the agent forward as a general agent or manager or places him in a position where others are justified in the belief that his powers are general, the restrictions that may be imposed privately on the agent are immaterial, except

as between the corporation and the agent, and cannot affect the rights or remedies of third parties dealing with the agent who have no knowledge of such restrictions. *Southwest Mo. Elect. R. Co.* v. *Missouri Pac. R. Co.*, 110 Mo. App. 300, 85 S. W. 966; *Farm & Home Sav. & Loan Ass'n* v. *Stubbs, supra*; *Rosenbaum* v. *Gilliam, supra.*"

The case last cited is the most recent pronouncement of the Supreme Court of Missouri in respect to the authority of an agent upon whom his principal has conferred the title "manager" and, like the instant case, it involved the authority of the manager of a branch office, as distinguished from the manager of the home office. The case does not announce a new rule in Missouri. It is, instead, but a restatement of a rule long recognized and applied by the appellate courts of Missouri.[2]

The Forbes case cannot be distinguished from the instant case. In each case the agent involved was manager of a branch office. In the Forbes case, the principal had placed in possession of the bank an instrument in respect to the agent's authority and, in the instant case, the principal had placed in the hands of petitioner a telegram which referred him to their local manager for further information in respect to the authority of a manager in a remote territory. In the Forbes case, the instrument did not expressly recognize authority in Einhorn to make use of company funds by depositing them to his

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[2]*Kelso* v. *Lincoln National Life Ins. Co.*, 227 Mo. App. 184; *State* v. *Hemenover*, 188 Mo. 381; *Thompson* v. *Insurance Co.*, 169 Mo. 12; *James* v. *Mutual Reserve Ins. Co.*, 148 Mo. 1; *Springfield Steam Laundry Co.* v. *Traders' Ins. Co.*, 151 Mo. 90; *Bacon Piano Co.* v. *Metcalf Jewelry & Music Co.*, 225 Mo. App. 463; *Buffalo Trust Co.* v. *Producers' Exchange No. 148, California, Mo.*, 224 Mo. App. 199; *Robinson* v. *Moark-Nemo, etc., Mining Co.*, 178 Mo. App. 531, 539; *Concrete & Steel Construction Co.* v. *National Asphalt Refining Co.*, (Mo. App.) 2 S. W. 2d 157; *Farm & Home Savings & Loan Ass'n* v. *Stubbs*, 231 Mo. App. 87.

personal account, nor in the instant case did the telegram expressly recognize authority in Mr. Evans to confirm the genuineness of a bond written by a manager in a remote territory. But, in each case, there was a recognition of authority sufficient to permit a reasonable inference that the agent was invested with the general conduct and control of the company's business in the particular locality, with full authority to consummate the impending business.

The Forbes case was disposed of by the majority opinion of the Circuit Court of Appeals as follows (R. 219):

> "In the course of the opinion there are general expressions stating the rule set out above applicable to the apparent or implied powers of a general agent. It is obvious that the nature of the question concerning the implied authority of a branch manager which has arisen in this case was not particularly called to the attention of the court in that case. The case cannot, therefore, be relied upon as an authority in this case where the exact point is in issue. *Had the court's attention been directed to the distinction it would no doubt have been more precise in its statement*" (Italics ours).

It thus seemed to be the impression of the majority of the judges of the Circuit Court of Appeals that the Supreme Court of Missouri, in the Forbes case, loosely expressed the law of Missouri.

Judge Gardner viewed the Forbes case differently. In his dissenting opinion, he said (R. 223):

> "In the Forbes case, the manager was the manager of a branch office. Here, the manager was referred to by the company as 'our manager.' I think, therefore, it could not properly be said as a matter of law that there was no evidence of the execution and delivery of the note and bond."

The fundamental error of the majority opinion is the assumption that the function of a branch office of a corporation is limited to business originating in the territory served by that office. There was not one word of evidence that its function was thus limited and, indeed, no such limitation was brought to the attention of petitioner. The purpose of establishing branch offices is to provide a place for local patrons to transact business with the company regardless of the place where the particular business may have arisen. Petitioner was a resident of Kansas City, Missouri. He was referred by respondent to its local manager for further information in respect to the authority of a manager in a distant territory. Clearly, he had the right to assume that if the local manager could pass upon the authority of a manager in a distant territory, he could, unless otherwise informed, likewise pass upon the genuineness of a bond purportedly executed by that manager. Mr. Evans viewed the matter in exactly the same manner. He stated that he was familiar with the signature and that he knew it was genuine. He did not tell petitioner that he was without authority. On the contrary, he went from his office to the office of the First National Bank of Kansas City to give petitioner the assurances which led to the consequent loss. It was clearly a question for the jury, and not for the District Judge, to say whether respondent's manager had actual or implied authority to confirm the validity of the bond.

(c)

The Declarations of W. R. Evans, Manager of Respondent's Kansas City Office, Were Admissible in Evidence and Did Not Violate the Hearsay Rule.

In the majority opinion, it is stated (R. 213):

"When considered only in connection with the execution of the bond Evans' declarations were mere conclusions and clearly hearsay, and they were prop-

erly stricken on that ground. He was not produced as a witness. He did not testify under oath, and there was no opportunity to cross-examine him. The conversation at the bank was not in the presence of the defendant, nor of any of its representatives other than Evans."

In the dissenting opinion, it is said (R. 222):

"Evans is not to be considered as an expert witness giving an opinion, but as an officer making binding admissions. He told plaintiff that the bond was signed by defendant's authorized agent and that it represented its binding obligation. Evans was the only officer of the defendant participating in this transaction in Kansas City. What he said about this transaction was admissible against the defendant, and, hence, the testimony of the plaintiff and of Mr. Riley should not have been stricken. This testimony established, *prima facie* at least, the execution of the bond by an authorized agent of the defendant."

In the case of *Shelton* v. *Wolf Cheese Co.*, 338 Mo. 1129, decided by the Supreme Court of Missouri, it was said:

"Whatever is said by an employee or agent of a private corporation in respect to and in the course of any transaction, or in connection with and accompanying and relating to the performance of any act, in which he is then engaged, 'or, in the language of the old writers, *dum fervet opus*,' while he, acting within the scope of his employment or authority, is carrying on or transacting the business, or doing the work, of his master or principal, is admissible in evidence, as an admission or declaration, against the principal (the Latin phrase, *supra*, is translated 'while the work glows' or 'in the heat of action'); * * *."

The above stated rule is well established in Missouri. *State* v. *Armour Packing Co.*, 173 Mo. 356; *Whittington* v. *Westport Hotel Operating Co.*, 326 Mo. 1117; *Philibert* v. *Benjamin Ansehl Co.*, 342 Mo. 1239; *Green* v. *American*

Life & Accident Ins. Co., (Mo. App.) 93 S. W. 2d 1119; *Simpson Adv. Service Co.* v. *Manufacturers & Merchants Ass'n,* 330 Mo. 1049.

The declarations of Mr. Evans were made in the course of, and in connection with, the business that he was then transacting for his principal. It has heretofore been shown that as manager of the Kansas City office he was acting within the actual or apparent scope of his authority. His declarations were, therefore, binding upon his principal and were admissible in evidence to establish, *prima facie,* the validity of the guaranty bond.

(d)

A Prima Facie Case Was Made under the Missouri and Federal Statutes Relating to Proof of Disputed Writings.

Section 1751, Missouri Revised Statutes, 1929, provides:

> "Comparison of Disputed with Genuine Writings —Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute."

There is a federal statute containing similar provisions.[3]

The Missouri statute has been construed by the Supreme Court of Missouri in the case of *Sanders* v. *North End Building & Loan Ass'n,* 178 Mo. 674, where, in support of a plea of *non est factum,* the defendant offered specimens of the genuine signature. It was held that it was a question for the jury to determine whether the disputed signature was genuine by comparing it with the specimen even if there had been no other evidence in the case. In that case, the Supreme Court said:

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[3]Title 28, United States Code, Annotated, Sec. 638.

"The case made by the plaintiff in chief was by no means clear or strong or convincing, but there was evidence sufficient to take the case to the jury. *The defendant identified and offered in evidence the various checks signed by Charles James, and thereby afforded the jury a legitimate basis of comparison by which to judge for themselves whether the notes in suit were signed by James or not.* Formerly only such writings as were properly in a case to prove some issue in the case or for a legitimate purpose and having a direct bearing upon the case could be used as a basis of comparison by which to judge the genuineness of a paper or writing or signature that was in question in the case (*State* v. *Thompson*, 132 Mo. l. c. 325). But afterwards this rule was changed by statute, as it is now provided by Section 4679, Revised Statutes, 1899, as follows:

> 'Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.'

"This provision of the statute was applied upon the second trial of the *Thompson case, supra*, and it was contended that the act could not be constitutionally so applied, because it was passed after the commission of the act of the defendant then on trial, but this court held the contention to be untenable (*State* v. *Thompson*, 141 Mo. l. c. 416).

"This act was also considered by the St. Louis Court of Appeals in *Bank* v. *Hoffman*, 74 Mo. App. 203, and it was pointed out by Bond, J., in that case, that the act is a literal copy of the English act of 1854, and that, under the English act, it was the rule that the jury was entitled to make a comparison, and to judge therefrom as to the genuineness of the writing in dispute.

"The defendant, therefore, furnished the jury such a basis of comparison by introducing the checks

signed by James that were conceded to be genuine, and the jury, therefore, had substantial evidence upon which to base a verdict, even if there had been none in the case before" (Italics ours).

See, also, *State* v. *Pace*, 269 Mo. 682, and *State* v. *Thompson*, 141 Mo. 408.

The Circuit Court of Appeals disposed of this contention by holding (1) that the specimen of the genuine signature was not sufficient to make a question for the jury for the reason that the guaranty bond was not properly in evidence, and (2) that even if it was competent to prove the signature, there had been no showing that respondent delivered the guaranty bond and that an instrument is not executed unless it is both signed and delivered.

In any case where a comparison of signatures is availed of to prove execution of a written instrument, the instrument is not properly in evidence until after the comparison is made.[4] It is the introduction of the genuine signature that puts the instrument in evidence. *Sanders* v. *North End Building & Loan Ass'n, supra.*

On the question of delivery, the record shows that the guaranty bond was in the possession of F. E. Colvin, the obligee therein, when it was first presented to petitioner (R. 37-38). Mr. Colvin then delivered it to the trust department of the First National Bank of Kansas City in pursuance of the escrow agreement (R. 84, 85, Exh. 5). It was there inspected by Mr. Evans, Manager of respondent, and was confirmed in all respects (R. 52, 103). Moreover, the letter of March 27, 1935, purported to confirm the bond and Mr. Evans, respondent's manager, declared that the letter was genuine and came from respondent's home office. If the majority opinion of the Circuit Court of Appeals is correct in holding that the presumption of delivery disappears where execution

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[4]Compare *Broadway Bank of Kansas City* v. *Stroud et al.*, (Mo. App.) 51 S. W. 2d 555, where the instrument was received in evidence before the specimen signature.

of the instrument is denied under oath, we submit, nevertheless, that there was ample evidence of delivery. The declarations of respondent's manager that the bond was valid and "like money on the barrel-head," as well as the letter of March 27, 1935, implied that it had been delivered. Mr. Colvin's possession of the bond was a circumstance tending to show that it had been delivered to him by respondent.[5] Delivery of an instrument, like any fact in issue, may be shown by circumstantial evidence.[6]

(e)

The Effect of Rule 8(c) of the Federal Rules of Civil Procedure on the Burden of Proof.

The Circuit Court of Appeals held that the Missouri statute placing the burden of proof upon petitioner to prove execution of the guaranty bond was applicable notwithstanding the provisions of Rule 8(c) of the Federal Rules of Civil Procedure. Judge Gardner, in his dissenting opinion, adopted the contrary view and cited the recent case of *Fort Dodge Hotel Co.* v. *Bartelt*, 119 F. 2d 253, decided by the Circuit Court of Appeals for the Eighth Circuit. Rule 8(c) provides:

> "(c) *Affirmative Defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consider-

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[5]*Hurt* v. *Ford*, 36 S. W. 671, judgment reversed 142 Mo. 283, 44 S. W. 228; *Houghton* v. *Jacobs*, (Mo. Sup.) 246 S. W. 285; *Earle* v. *Woodruff*, (Mo. App.) 274 S. W. 107; *Singleton* v. *Mann*, 3 Mo. 464. Compare *Meredith* v. *Brock*, 322 Mo. 869, cited in the majority opinion of the Circuit Court of Appeals, where possession of the instrument remained with the alleged maker.

[6]*Gardner* v. *Crenshaw*, 122 Mo. 79; *Coffman* v. *Fleming*, 301 Mo. 313; *Slabon* v. *St. Louis Car Co.*, (Mo. App.) 138 S. W. 2d 673; *McDonald* v. *Kansas City Gas Co.*, 332 Mo. 356, 59 S. W. 2d 37; *Fryer* v. *St. Louis-San Francisco Ry. Co.*, 333 Mo. 740, 63 S. W. 2d 47; *Sills* v. *Burge*, 141 Mo. App. 148, 124 S. W. 605.

ation, fraud, illegality, injury by fellow servant, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

In the case of *Fort Dodge Hotel Co.* v. *Bartelt*, 119 F. 2d 253, 258, the court said:

> "Regardless of what may be thought to be the implications of Rule 8(c) with respect to the burden of proof of contributory negligence as a matter of procedure, we are satisfied that the rule does not have the effect of casting upon a defendant the burden of disproving the plaintiff's freedom from contributory negligence, where under the applicable state law that is an essential element of the plaintiff's cause of action which must be proved if he is to prevail."

The question is, therefore, whether the Missouri statute affects the cause of action or merely the mode of proving it. If it has the former effect, it is a matter of substantive law and if it has the latter effect, it is merely a procedural matter.

Under the law of Missouri, in an action on a contract, the burden is upon the plaintiff to prove the cause of action alleged in his petition.[7] The only effect of the statute is to relieve plaintiff of the burden of proving execution of the contract in the absence of a plea of *non est factum*.[8] But even though the burden of proof is always upon plaintiff to prove the cause of action alleged, the burden of the evidence in respect to certain issues may

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[7]*Lampe* v. *Franklin American Trust Co.*, 339 Mo. 361; *Robertson* v. *Shepherd*, 165 Mo. 360, 65 S. W. 573; *International Textbook Co.* v. *Yount*, 129 Mo. App. 247, 108 S. W. 124.

[8]*State ex rel. City of Maplewood* v. *Southern Surety Co.*, 323 Mo. 150, 19 S. W. 2d 691.

shift to defendant.[9] And where plaintiff has offered evidence sufficient to show, *prima facie*, the genuineness of a written instrument, the burden of the evidence shifts to defendant.[10] But the burden of proof, or risk of non-persuasion, remains with plaintiff throughout the proceeding, and never shifts.[11]

Applying these principles in the instant case, it is clear that the Missouri statute does not change, or inhere in, the cause of action because, as heretofore shown, it does not affect the burden of proof which always rests upon the plaintiff. It merely provides the mode of raising the issue of execution of a written instrument.

Under Rule 8(c), the burden of the evidence in respect to the alleged forgery was upon respondent. It was nothing more than a matter of procedure at the trial where, as stated before, the risk of non persuasion, or burden of proof in the strictest sense, was, at the beginning, and always remained, upon petitioner.

(f)

The Importance of the Question Presented.

The decision of the Circuit Court of Appeals, if allowed to stand, will seriously affect the branch office system of doing business. It is indisputable that there have grown up in this country large business enterprises, usually having their principal offices in some large city with numerous branch offices in many other states in the

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[9]*Campbell* v. *Terminal R. Ass'n of St. Louis*, 126 S. W. 2d 915; *Cluck* v. *Abe*, 328 Mo. 81, 40 S. W. 2d 558; *Connole* v. *E. St. Louis & S. Ry. Co.*, 340 Mo. 690, 102 S. W. 2d 581; *State ex rel. Stevens* v. *Arnold*, 326 Mo. 32, 30 S. W. 2d 1015; *McCloskey* v. *Koplar*, 329 Mo. 527, 46 S. W. 2d 557; *Clapper* v. *Larkin*, 343 Mo. 710, 123 S. W. 2d 27; *Downs* v. *Horton*, 287 Mo. 414, 230 S. W. 103; *Bond* v. *St. Louis-San Francisco Ry. Co.*, 315 Mo. 987, 288 S. W. 777.

[10]*Lampe* v. *Franklin American Trust Co.*, *supra*.

[11]*Id.*

Union. In each unit or branch of the business is placed in authority one who is generally designated the "manager" who is responsible for the conduct of the company's business in that locality. To permit a corporation doing business in this manner to escape liability for the acts of its manager on the ground that he is not one of the principal officers of the corporation and that he must have actual express authority to do the particular thing in question would be going far afield from reality, because, for all practical purposes, the manager of a branch office is the head of the corporation in that locality. *James H. Forbes Tea & Coffee Company* v. *Baltimore Bank, supra.*

Under the decision of the Circuit Court of Appeals, a local patron would be bound to inquire of the home office whether the local manager had authority to transact a particular kind of business. A building contractor with its principal office in Kansas City, about to undertake a construction job in Florida, could not be sure that the Kansas City manager of a surety company had authority to write his performance bond and would be compelled to inquire of the home office.

The purpose of the branch office system is to contact patrons in many localities. It is not confined to transactions originating in any particular locality. For all practical purposes, respondent's Kansas City office was a portion of its home office established in Kansas City to accommodate patrons desiring to transact business there.

Conclusion.

In conclusion, it is respectfully submitted that the Circuit Court of Appeals has decided important questions of local law in a manner in conflict with local decisions and that, accordingly, the decision should be reviewed by this Court.

Respectfully submitted,

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No. 571

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

W. F. COEN, PETITIONER,

VS.

AMERICAN SURETY COMPANY OF NEW YORK, A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MITCHEL J. HENDERSON,
THOS. E. DEACY,
Counsel for Respondent.

BEN W. SWOFFORD,
Of Counsel.

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Argument—

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II. The Court of Appeals by holding that the declarations of W. R. Evans, respondent's branch manager at Kansas City, to the effect that he was acquainted with L. Bert Nye's signature and in his opinion it was genuine, were inadmissible in evidence because violative of the hearsay rule, was not in conflict with controlling decisions of the Supreme Court of Missouri in the cases of Shelton v. Wolf Cheese Company, 338 Mo. 1129, 93 S. W. (2d) 947; Whittington v. Westport Hotel Operating Company, 326 Mo. 1117, 33 S. W. (2d) 963; Philbert v. Benjamin Anshel Company, 342 Mo. 1239, 119 S. W. (2d) 797;

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III. The opinion of the Circuit Court of Appeals in holding that the introduction in evidence by respondent of the genuine signature of L. Bert Nye did not show prima facie the genuineness of the guaranty bond, did not decide an important question of local law in a manner (1) in direct conflict with controlling decisions of the Supreme Court of Missouri in the cases of Sanders v. North End Building & Loan Assn., 178 Mo. 674, 77 S. W. 833; State v. Thompson, 141 Mo. 408, 42 S. W. 949; and State v. Pace, 269 Mo. 682, 192 S. W. 428, (2) in conflict with and violative of Section 1751, Missouri Revised Statutes, 1929 and (3) in conflict with and violative of the Federal Statute in respect to proof of disputed writings (28 U. S. Code Ann. 638) 19

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No. 571

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

W. F. COEN, PETITIONER,

VS.

AMERICAN SURETY COMPANY OF NEW YORK, A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE.

The statement of fact contained in the petition for writ of certiorari herein omits certain points which respondent wishes to call to this Court's attention.

It was alleged in the petition under which the cause was tried, that on or about March 28, 1935, one F. E. Colvin sold and transferred to appellant a certain promissory note made March 14, 1935, due ninety days after date, payable to the order of said F. E. Colvin in the principal sum of Thirty-five Hundred ($3500.00) Dollars; that said note was executed by Gem City

Finance Company, Inc., by W. Erdman Love, President. A certified copy of the purported note was attached to plaintiff's petition (Tr. 1).

Plaintiff's petition further alleged that as a further consideration of the purchase of the note, F. E. Colvin assigned and transferred to the plaintiff a guaranty bond dated March 14, 1935 executed by the defendant, American Surety Company of New York, and that under the terms and provisions of the same, defendant guaranteed the payment in full of said promissory note on its maturity, and that in the event said note was not paid in full at maturity, defendant agreed to pay to said Colvin the sum of Thirty-five Hundred ($3500.00) Dollars, together with interest and expense incurred in connection with the note (Tr. 2).

Plaintiff's petition further alleged that no part of either the principal or interest due on said note had been paid, and that by reason thereof and under the terms and provisions of the guaranty bond, defendant was indebted to him for the principal of the note.

Under the verified answer of the defendant it was alleged that the alleged note of the Gem City Finance Company, purported to have been sold by Colvin to plaintiff, was a forgery and not a binding obligation on the Gem City Finance Company, and that the bond sued upon, was a forgery and was never signed or executed by the defendant, or any one representing it. Execution of the bond and note for which it was allegedly given as security were both denied, under oath, by defendant.

There was in full force and effect at said time in the State of Missouri, Section 965 Revised Statutes of Missouri, 1929, applicable portions of which were in words and figures as follows:

> "When any petition or other pleading shall be founded upon any instrument in writing, charged to have been executed by the other party and not alleged therein to be lost or destroyed, the execution of such instrument shall be adjudged confessed, unless the party charged to have executed the same deny the execution thereof, by answer or replication, verified by affidavit."

The answer of the defendant in the District Court denied the execution of the bond sued upon, and the answer was duly verified by affidavit, as provided for in above section of the Missouri Statutes.

The plaintiff testified that he made inquiry of Mr. Evans concerning the genuineness of the bond, because he was "depending entirely upon his judgment and opinion in the matter". (Tr. 48 and 51). Prior to the trial of the cause, plaintiff filed no request, under Rule 36 of the Rules of Civil Procedure, for admission of the genuineness of the documents relied upon. The evidence in the cause conclusively established that the alleged note was a forgery; that the bond was a forgery, and that the purported letter from the home office of the defendant company was a forgery. Not only that, but that the stationery upon which it was written was also a forgery.

The evidence disclosed that L. Bert Nye was the manager of the defendant company's branch office at Washington, D. C., and that W. R. Evans was manager of defendant's Kansas City branch office, and that the company had various other branch offices in other cities in the United States.

In the majority opinion of the Circuit Court of Appeals it was correctly said:

> "It is shown by the undisputed evidence that the defendant transacts business over an extensive

territory; that its principal office and the home of its general officers are in New York City, and that it has established in various cities of the United States offices for the transaction of business arising in their respective localities, which offices are under the immediate supervision of agents called branch managers."

The plaintiff knew that the purported bond sued upon had allegedly been executed by L. Bert Nye, the defendant's branch manager at Washington, D. C., and that W. R. Evans, branch manager of the Kansas City office had nothing to do with any negotiations leading up to the alleged execution or delivery of the bond. It was not established that Evans had any knowledge of the transaction except through statements made to him by Coen subsequent to the date of the alleged execution and delivery of the bond sued upon.

The foregoing facts are called to the Court's attention for the reason that they do not appear in petitioner's statement.

SUMMARY OF ARGUMENT.

I.

The opinion of the Court of Appeals in holding that under the evidence W. R. Evans, manager of respondent's office in Kansas City, Missouri was without authority to confirm the validity of the guaranty bond alleged to have been executed by L. Bert Nye, manager of another branch office of the respondent in Washington, D. C., was in no wise in conflict under the facts as disclosed by the record in the case, with the opinion of the Supreme Court of Missouri in the case of James H. Forbes Tea & Coffee Company vs. Baltimore Bank, 345 Mo. 115, 139 S. W. (2d) 507.

James H. Forbes Tea & Coffee Co. v. *Baltimore Bank,* 345 Mo. 115, 139 S. W. (2d) 507.

Kelso v. *Lincoln Natl. Life Ins. Co.,* 227 Mo. App. 184, 51 S. W. (2d) 203.

Punton v. *United States Life Ins. Co.,* 213 Mo. App. 49, 245 S. W. 1080.

Bradley-Metcalfe Co. v. *Tootle-Campbell Dry Goods Co.,* (Mo. App.) 180 S. W. 389.

Sanders v. *Chartrand,* 158 Mo. 352, 59 S. W. 95, 98.

Skene v. *Union Casualty & Surety Co.,* 91 Mo. App. 120.

Sedalia Natl. Bank v. *Economy Steam Heating & Electric Co.,* 145 Mo. App. 319, 130 S. W. 377.

Chenoweth v. *Pacific Express Co.,* 93 Mo. App. 185.

St. Louis Beverage Company v. *Planters Grain Elevator, Mule & Feed Co.*, 200 S. W. 780 (Mo. App.)

Scrivner v. *American Can & Foundry Co.*, 330 Mo. 408, 50 S. W. (2d), 1001.

II.

The Court of Appeals by holding that the declarations of W. R. Evans, respondent's branch manager at Kansas City, to the effect that he was acquainted with L. Bert Nye's signature and in his opinion it was genuine, were inadmissible in evidence because violative of the hearsay rule, was not in conflict with controlling decisions of the Supreme Court of Missouri in the cases of Shelton vs. Wolf Cheese Company, 338 Mo. 1129, 93 S. W. (2d) 947; Whittington vs. Westport Hotel Operating Company, 326 Mo. 1117, 33 S. W. (2d) 963; Philbert vs. Benjamin Anshel Company, 342 Mo. 1239, 119 S. W. (2d) 797; Simpson Advertising Company vs. Manufacturing & Merchants Association, 330 Mo. 1049, 51 S. W. (2d) 1019; State ex inf. vs. Armour Packing Company, 173 Mo. 359, 73 S. W. 645.

Shelton v. *Wolf Cheese Company*, 338 Mo. 1129, 93 S. W. (2d) 947.

Whittington v. *Westport Hotel Operating Co.*, 326 Mo. 1117, 33 S. W. (2d) 963.

Philbert v. *Benjamin Anshel Co.*, 342 Mo. 239, 119 S. W. (2d) 797.

Simpson Advertising Company v. *Manufacturing & Merchants Association*, 330 Mo. 1049, 51 S. W. (2d), 1019.

State ex inf. v. *Armour Packing Company*, 173 Mo. 359, 73 S. W. 645.

III.

The opinion of the Circuit Court of Appeals in holding that the introduction in evidence by respondent of the genuine signature of L. Bert Nye did not show prima

facie the genuineness of the guaranty bond, did not decide an important question of local law in a manner (1) in direct conflict with controlling decisions of the Supreme Court of Missouri in the cases of Sanders vs. North End Building & Loan Assn., 178 Mo. 674, 77 S. W. 833; State vs. Thompson, 141 Mo. 408, 42 S. W. 949; and State vs. Pace, 269 Mo. 682, 192 S. W. 428, (2) in conflict with and violative of Section 1751, Missouri Revised Statutes, 1929 and (3) in conflict with and violative of the Federal Statute in respect to proof of disputed writings (28 U. S. Code Ann. 638).

Section 965 Revised Statutes of Missouri, 1929.

Meredith v. *Brock*, 322 Mo. 869, 17 S. W. (2d) 345.

Sanders v. *North End Building & Loan Assn.*, 178 Mo. 674, 77 S. W. 833.

State v. *Thompson*, 141 Mo 408, 42 S. W. 949.

State v. *Pace*, 269 Mo. 682, 192 S. W. 428.

Section 1751 Revised Statutes of Missouri, 1929, 28 U. S. Code Ann. 638.

IV.

The Circuit Court of Appeals by holding that the burden of proof lay upon petitioner to prove that the guaranty bond was not a forgery did not decide an important procedural question in a manner violative of the provisions of Rule 8 (c) of the Federal Rules of Civil Procedure.

Meredith v. *Brock*, 322 Mo. 869, 17 S. W. (2d) 345.

Rule 8 (c) Federal Rules of Civil Procedure.

Rule 36 Federal Rules of Civil Procedure.

V.

The importance of the question presented.

McDearmott v. *Sedgwick*, 140 Mo. 172, 39 S. W. 776.

Miller v. *Bowen Coal & Mining Co.*, 40 S. W. (2d) 485 (Mo. App.).

State ex rel. v. *Globe Indemnity Co.*, 29 S. W. (2d) 743 (Mo. App.).

ARGUMENT.

(A) The basis of the petition for writ of certiorari to the United States Circuit Court of Appeals, is the contention that the opinion of the Circuit Court of Appeals decided important questions of local law in a manner in direct conflict with prior decisions of the Supreme Court of Missouri, and in conflict with and in violation of the provisions of Rule 8 (c) of the Federal Rules of Civil Procedure.

The reasons relied upon for allowance of the writ, and the alleged specifications of error, will be answered in this argument in the same order in which they appear in petitioner's petition and brief in support thereof.

I.

The opinion of the Court of Appeals in holding that under the evidence W. R. Evans, manager of respondent's office in Kansas City, Missouri was without authority to confirm the validity of the guaranty bond alleged to have been executed by L. Bert Nye, manager of another branch office of the respondent in Washington, D. C., was in no wise in conflict under the facts as disclosed by the record in the case, with the opinion of the Supreme Court of Missouri in the case of James H. Forbes Tea & Coffee Company vs. Baltimore Bank, 345 Mo. 115, 139 S. W. (2d) 507.

Circuit Judge Thomas in the majority opinion in this case held that the evidence showed that W. R. Evans, the branch manager of the respondent at Kansas City, Missouri, was without express or implied authority to confirm the validity of the guaranty bond sued upon, and held that nothing in the telegram from the New

York office of the respondent expressly represented that the said Evans was authorized to pass upon the validity of the guaranty bond executed by branch manager Nye of Washington, D. C.

The majority opinion in this respect followed and applied the ruling decisions of the Appellate Courts of the State of Missouri, and was in no way in conflict with the decision of the Supreme Court of Missouri in the case of *James H. Forbes Tea & Coffee Company* v. *Baltimore Bank*, 345 Mo. 115, 139 S. W. (2d) 507, as contended by the petitioner.

In that case the tea company sued the bank in conversion for the shortage occasioned by their acceptance of company checks endorsed by Einhorn. The bank defended upon the ground that Einhorn had implied authority to handle the company funds and to deposit the same in his personal account. The facts in that case can be clearly distinguished from the case at bar in the following particulars:

(1) The appellant tea company, being plaintiff, had the burden of proving that Einhorn had acted *outside* the scope of his authority as branch manager; while in the case at bar, the burden was upon the petitioner to show that Evans acted *within* the scope of his authority.

(2) The appellant tea company had given Einhorn the express written authority "to receive payment of accounts"; while in the case at bar, no express authority to Evans was shown.

(3) The evidence in the tea company case was detailed, and particularly as to the nature and extent of Einhorn's powers and duties as branch manager; while in the case at bar, none of Evans' powers, obligations, or duties were shown, except the bare fact he bore the title

of branch manager. As Judge Thomas said in the majority opinion in the case at bar (Tr. 218):

> "Plaintiff's last contention is that Evans' specific authority to pass upon the validity of the bond is implied in the admitted fact that he was the branch manager of defendant's Kansas City office. The burden was upon plaintiff to show that the representation made by Evans was within the scope of his powers and duties. There is no evidence in the record showing Evans' actual authority nor the nature of his duties on behalf of the defendant from which his authority could be implied. The plaintiff's contention depends wholly upon the general authority of the agent of a corporation implied as a matter of law in the title Branch Manager."

(4) In the tea company case there was competent evidence that the company had actual knowledge that Einhorn was receiving payments on its accounts and depositing the same in his personal checking account at the defendant bank, and it was shown that the tea company had requested Einhorn to make remittances of the money to it, and that Einhorn, in accordance with this request, had actually remitted some of the money to the tea company by means of his personal check; while in the case at bar, there was no showing that the defendant surety company knew anything about the Coen-Colvin-DeArmand deal, or the activities of Evans in regard thereto.

(5) All of the details and transactions giving rise to the conversion suit against the bank by the tea company directly pertained to the business of the tea company carried on in its Kansas City branch and entrusted to the sole management of its branch manager Einhorn; while in the case at bar, the deal so far as it related to the surety company, was purportedly carried on and transacted in Washington, D. C. at the office of the company which was in charge of L. Bert Nye, and over which Evans had no supervision or control.

(6) In the case at bar, the alleged statements of Evans vouching for the validity of the surety bond, upon which plaintiff relies as sole ground for estoppel, were at the most a mere expression of opinion as to the genuineness of the alleged signature of Nye and the legality of the bond, and were so understood by the plaintiff; while in the tea company case there was undisputed evidence of actual endorsements by Einhorn of company remittances and the depositing of those remittances to his personal account.

The real reasons for the conclusion reached by the Supreme Court of Missouri in the *James H. Forbes Tea & Coffee Company* case clearly appears in the following language: (139 S. W. (2d) l. c. 509)

> "The only conclusion that can be drawn from the evidence is that Einhorn was appellant's manager of the Kansas City branch. Appellant executed the instrument addressed 'To whom it may concern', stating that Fred Einhorn was its manager with power 'to receive payments on accounts' not merely to receive collections. This instrument was given to respondent two days after Einhorn made the deposit with the bank. Moreover, the oral evidence shows that Einhorn, and no one else, was the manager during the time in question. He had authority to employ and discharge the employees of the Kansas City Branch. He had authority to arrange for discounts with its customers; to allow customers credit for advertising; to settle accounts and to receive payment of accounts. As previously stated, the Kansas City customers of appellant dealt only with that branch office; merchandise was sent to it and then later sold to the customers, the same as if it had been an independent jobber. Moreover, appellant's president wired Einhorn on several occasions to send them 'a big check' which was done by Einhorn's sending them his personal check drawn on respondent bank. He could not have meant a

check on the Commerce Trust Company because the St. Louis office knew exactly the amount on deposit in that bank, and only the officers of the home office had authority to sign checks on that bank. There is evidence in the record that Einhorn had endorsed appellant's check long before he opened an account in respondent bank."

Judge Thomas in the majority opinion in the case at bar, in discussing the James H. Forbes Tea & Coffee Company case, properly said (Tr. 219):

"In that case the liability of the defendant bank depended upon the authority of a branch manager of the plaintiff to endorse checks payable to the plaintiff and to deposit them in his personal account in the bank. Basing its conclusion upon particular facts and the course of conduct of the plaintiff the court held that: 'Einhorn (the branch manager) had the apparent, if not the actual, authority to endorse the checks.' In the course of the opinion there are general expressions stating the rule set out above applicable to the apparent or implied powers of a general agent. It is obvious that the nature of the question concerning the implied authority of a branch manager which has arisen in this case was not particularly called to the attention of the court in that case. The case cannot, therefore, be relied upon as an authority in this case where the exact point is in issue. Had the court's attention been directed to the distinction it would no doubt have been more precise in its statements. It is a settled rule 'that general expressions in an opinion, which are not essential to dispose of a case, are not permitted to control the judgment in subsequent suits.' *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 291. * * *. We are convinced of the truth of the foregoing observations in respect to the opinion in the Baltimore Bank case, *supra*, for the reason that the courts of Missouri have consistently, insofar as our investigation has disclosed and insofar as we are aided by the briefs, applied the restricted second

rule, *supra*, in determining the implied scope of the authority of subordinate agents and branch managers or agents in charge of particular units of their principals' business."

The "second rule" referred to by Judge Thomas, is that where one is entrusted with the management of a particular branch of a business his authority does not extend beyond such contracts and acts as are incident to the management of that particular branch.

Such has been the rule in Missouri in a long line of decisions, namely:

Kelso v. *Lincoln Nat. Life Ins. Co.*, 227 Mo. App. 184, 51 S. W. (2d) 203.

Punton v. *United States Life Ins. Co.*, 213 Mo. App. 49, 245 S. W. 1080.

Bradley-Metcalf Co. v. *Tootle-Campbell Dry Goods Co.*, (Mo. App.), 180 S. W. 389.

Sanders v. *Chartrand*, 158 Mo. 352, 59 S. W. 95, 98.

Skene v. *Union Casualty & Surety Company*, 91 Mo. App. 120.

Sedalia Nat'l Bank v. *Economy Steam Heating & Electric Co.*, 145 Mo. App. 319, 130 S. W. 377.

Chenoweth v. *Pacific Express Co.*, 93 Mo. App. 185.

St. Louis Beverage Co. v. *Planters Grain, Elevator, Mule & Feed Co.*, 200 S. W. 780, (Mo. App.).

Scrivner v. *American Can & Foundry Co.*, 330 Mo. 408, 50 S. W. (2d) 1001.

The opinion of Judge Thomas properly followed the law in the State of Missouri regarding the implied authority of a branch manager, and the opinion of the court below in no wise conflicted with any previous opinions

of the Courts of last resort in the State of Missouri, and particularly was not in conflict with the *James H. Forbes Tea & Coffee Company* v. *Baltimore Bank, supra,* case.

We submit that the opinion in the last mentioned case is no authority for the position that the mere title of branch manager imparts binding authority to all actions of said managers, nor is it authority for the position of petitioner that Evans, because he bore the title of branch manager, had the authority to confirm the validity of the guaranty bond sued upon and bind his principal by such confirmation. The rule in Missouri remains that such actions must be shown to be within the scope of that branch manager's express or implied authority and must be shown to pertain to the position and duties entrusted to him, and the burden of proof of these matters rests upon the plaintiff.

There was an absolute failure on the part of the petitioner herein to prove by any competent evidence that Evans, the Kansas City branch manager of the respondent, had the express or implied authority to verify or confirm the guaranty bond sued upon.

We, therefore, respectfully submit that the opinion of Circuit Judge Thomas in the court below did not conflict with any prior decisions of the courts of last resort in the State of Missouri, and particularly was not in conflict with the case of *James H. Forbes Tea & Coffee Company* v. *Baltimore Bank, supra.*

II.

The Court of Appeals by holding that the declarations of W. R. Evans, respondent's branch manager at Kansas City, to the effect that he was acquainted with L. Bert Nye's signature and in his opinion it was genuine, were inadmissible in evidence because violative of the hearsay rule, was not in conflict with controlling decisions

of the Supreme Court of Missouri in the cases of Shelton vs. Wolf Cheese Company, 338 Mo. 1129, 93 S. W. (2d) 947; Whittington vs. Westport Hotel Operating Company, 326 Mo. 1117, 33 S. W. (2d) 963; Philbert vs. Benjamin Anshel Company, 342 Mo. 1239, 119 S. W. (2d) 797; Simpson Advertising Service Co., vs. Manufacturing & Merchants Association, 330 Mo. 1049, 51 S. W. (2d) 1019; State ex inf. vs. Armour Packing Company, 173 Mo. 359, 73 S. W. 645.

The opinion of the Circuit Court of Appeals was not in conflict under the facts disclosed by the record with any of the above opinions of the Supreme Court of Missouri, but laid down and followed the rule promulgated by those opinions. It is to be remembered that the petitioner in the District Court sought to establish the genuineness of the alleged bond sued upon after the execution of the same had been denied under oath by proving that subsquent to the date that the bond had been allegedly executed by L. Bert Nye, W. R. Evans, the defendant's district or branch manager at Kansas City stated that he was familiar with Nye's signature, and that in his opinion the signature was Nye's. This was purely an attempt to prove a declaration or an admission of the agent of the respondent relative to an act or transaction made after the occurrence of the act, namely, the alleged execution of the bond.

In the case of *Shelton* v. *Wolf Cheese Co.*, 338 Mo. 1129 the Supreme Court of Missouri said:

> "But 'declarations' or 'admissions' of an agent with respect to an act or transaction made after the occurrence of the act or the completion of the transaction are not provable against the principal. This rule is the basis for the exclusion of evidence of declarations of an agent that he had previously bound his principal by a contract, as well as for exclusion of evidence of the admissions of a servant whose alleged negligence caused injury to another made

> long after the accident. Such statements are merely hearsay like those of any other person, and cannot affect his principal. A rule that would allow an agent after a transaction is closed to admit away the rights of his principal would be too dangerous to be tolerated."

The fact that Evans was the branch manager for the respondent company at Kansas City, Missouri did not make his statement of opinion relative to the signature of Nye admissible to prove the genuineness of Nye's signature. It is to be remembered that Evans was not placed upon the stand. In *Shelton* v. *Wolf Cheese Co.* the Supreme Court of Missouri further said:

> "But we do not understand that a manager should be deemed to so represent the principal for all purposes that any statement or declaration at any time made by him in reference to the company's rights, interest or affairs at that point would be admissible in evidence against the principal."

The Circuit Court of Appeals, in ruling the alleged statements and declarations of W. R. Evans inadmissible in evidence because violative of the hearsay rule, followed the rule set forth by the Supreme Court of Missouri in above case.

In the case of *Whittington* v. *Westport Hotel Operating Co.*, 326 Mo. 1117 the statements of the agent relative to past transactions were admitted in evidence without any objection on the part of the defendant company. The Supreme Court of Missouri held that because no objection had been made error could not be predicated thereon. The Court said, l. c. page 1124:

> "The record shows that the foregoing conversations were admitted in evidence without an objection on the part of the Sidehoff Company. Consequently error may not be predicated thereon."

The opinion of the Circuit Court of Appeals in no wise conflicts with anything said by the Supreme Court of Missouri in that case.

In the case of *Philbert* v. *Anshel Co.*, 342 Mo. 1239 relied upon by the petitioner, the Court held that the admission in evidence of statements of an agent or an employee of the defendant as to past transactions was immaterial. The statement admitted in evidence was to the effect that the employee had stated that a certain other employee had made a box which caused the plaintiff's injury. The Court did not hold that such testimony was admissible, but stated that it was not error because if it was the defendant's duty to make the box it was immaterial which of its employees did the work, and that therefore the admission in evidence of the statement of the employee that he had made the box was immaterial and therefore not erroneous.

In the case of *Simpson Advertising Service Co.* v. *Manufacturers & Merchants Assn.*, 330 Mo. 1049 the statement admitted in evidence was made by the agent in charge of the transaction being then actually conducted. The Court held that the statement was admissible because it was made by the agent who was in full charge of the transaction of ordering the posters and frames the purchase price of which plaintiff sought to recover by the action. The statement was made at the time the agent was present for the purpose of ordering the posters and frames. The statement was made as a part of the transaction and was not a statement of opinion made after the occurrence of an act or the completion of a transaction as was the alleged statement of Mr. Evans concerning the genuineness of the bond made subsequent to the time that the name L. Bert Nye had been forged to the bond. The statements of agents held admissible in evidence under the opinion of the Supreme

Court of Missouri in the case of *State* v. *Armour Packing Co.*, 173 Mo. 356, were statements made during the very performance of an act and transaction. They were held admissible because so made. They were not statements or declarations made after the occurrence of an act or the completion of a transaction. They were not statements or expressions of opinion concerning the question of the genuineness of a disputed signature. The opinion of the Circuit Court of Appeals is in no wise in conflict with any of the opinions of the Supreme Court of Missouri cited and relied upon by petitioner on this point. The opinion of the United States Circuit Court of Appeals followed and applied the law of Missouri as laid down in the case of *Shelton* v. *Wolf Cheese Co., supra.*

In the case at bar, as shown by plaintiff's own evidence, it was his theory all negotiations for the bond had been had with L. Bert Nye, the defendant's branch manager at Washington, D. C., and with whose office W. R. Evans had no connection of any kind or character. It was the contention of the plaintiff that the bond had been executed and delivered by Nye on behalf of the surety company. If the bond was executed and delivered by Nye, then it became a legal, binding obligation at that time. Evans did not enter the picture until after all these acts had transpired and after the transaction had been completed. The bond at the time it was exhibited to Evans for his opinion, either was or was not a valid, binding obligation. The signature of L. Bert Nye thereon, either was or was not his genuine signature. Any statement made by Evans in regard thereto could be nothing more than a statement of an opinion that Nye had, or had not, previously thereto, affixed his name to the instrument.

III.

The opinion of the Circuit Court of Appeals in holding that the introduction in evidence by respondent of

the genuine signature of L. Bert Nye did not show prima facie the genuineness of the guaranty bond, did not decide an important question of local law in a manner (1) in direct conflict with controlling decisions of the Supreme Court of Missouri in the cases of Sanders vs. North End Building & Loan Assn., 178 Mo. 674, 77 S. W. 833; State vs. Thompson, 141 Mo. 408, 42 S. W. 949; and State vs. Pace, 269 Mo. 682, 192 S. W. 428, (2) in conflict with and violative of Section 1751, Missouri Revised Statutes, 1929 and (3) in conflict with and violative of the Federal Statute in respect to proof of disputed writings (28 U. S. Code Ann. 638).

The fallacy of this contention is well pointed out in the majority opinion of the Circuit Court of Appeals. The above cases and statutes merely hold that where the genuine and disputed signatures are properly before the jury that the jury has the power to look at the signatures and say which is genuine and which is a forgery. In the opinion of the Court of Appeals (Tr. p. 214) the Court said:

> "But on the issue of the actual execution of the bond the forged signature was not properly before the jury for comparison."

It is to be remembered that execution and delivery of the bond was denied under oath. Under the provisions of Section 965, R. S. Mo. 1929, as applied and interpreted by the appellate courts of Missouri the bond was not admissible in evidence until its execution was established by competent evidence offered by the plaintiff.

The Supreme Court of Missouri, in the case of *Meredith* v. *Brock, et al.*, 322 Mo. 869, 17 S. W. (2d) 345, held that where verified answer was filed under the terms of said statute denying the execution of the instrument sued upon the burden was upon the party re-

lying thereon to establish and prove by a preponderance of the evidence the execution of the instrument sued upon. In that case the Supreme Court of Missouri said:

> "In view of the verified answers of the several defendants which deny the signing and delivery (i. e. the execution) by Brock and his co-defendants of the alleged contract of October 29, 1925, which instrument is the foundation of plaintiff's petition, the burden rested upon plaintiff to establish and prove by a preponderance of the evidence the execution (including the signing and delivering) of the alleged contract."

Plaintiff offered not one syllable of evidence, outside of the hearsay testimony of W. R. Evans, concerning the genuineness of the bond, and no evidence of delivery. Under such circumstances plaintiff failed to meet the burden that is upon him under the law of Missouri and the Circuit Court of Appeals very correctly ruled and held that the forged signature was not properly before the jury for comparison with the genuine signature. The ruling of the Circuit Court of Appeals therefore was in no wise in conflict with any of the Missouri cases cited under this point, or in conflict with Section 1751 of the Missouri Revised Statutes of 1929, or 28 U. S. Code Ann. Section 638.

IV.

The Circuit Court of Appeals by holding that the burden of proof lay upon petitioner to prove that the guaranty bond was not a forgery did not decide an important procedural question in a manner violative of the provisions of Rule 8 (c) of the Federal Rules of Civil Procedure.

In the first place the Circuit Court of Appeals did not hold that the burden of proof was upon the plaintiff to prove that the guaranty bond was not a forgery.

What the Court of Appeals held was that under the pleadings, the execution and delivery of the bond having been denied under oath the burden of proof was upon the plaintiff to prove execution and delivery of the instrument sued upon. In so holding and ruling the Circuit Court of Appeals followed and applied the rule laid down by the Supreme Court of Missouri in the case of *Meredith* v. *Brock, et al.*, 322 Mo. 869 17 S. W. (2d) 345 heretofore cited and referred to. The ruling of the Court of Appeals was not violative of the provisions of Rule 8 (c) of the Federal Rules of Civil Procedure. That section does not provide for or fix the burden of proof in cases involving disputed documents or forged instruments.

Rule 8 (c) of the Federal Rules of Civil Procedure in no wise shifts the burden of proof from plaintiff to a defendant. In the case at bar the burden of proving execution and delivery of the bond sued upon was upon the plaintiff. Rule 8 (c) merely provides that the burden of proof in affirmative or special defenses shall be upon the party asserting them. In the case at bar no duty or burden devolved upon the defendant to disprove the execution and delivery of the bond sued upon until the plaintiff had sustained the burden of proving execution and delivery.

Rule 8 (c) of the Federal Rules of Civil Procedure had absolutely no application under the facts in the case at bar. The applicable rule had the plaintiff sought to benefit was Rule 36, Rules of Civil Procedure. That rule provides that after the pleadings are closed a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant document described in and exhibited with the request, or of the truth of any relevant matters of

fact set forth therein, and then provides that the opposite party shall either admit or deny under sworn statement the matters of which an admission is requested. Of course, under that rule, if the genuineness of the bond had been admitted by the defendant then it would have been unnecessary for the plaintiff to establish the genuineness of the same. However, even under that rule, had plaintiff sought to take advantage of the same a sworn denial of the genuineness of the instrument sued upon would have placed the burden of proof upon the plaintiff.

V.

The importance of the question presented.

Petitioner states in Section F of his argument that if the decision of the Circuit Court of Appeals herein is allowed to stand it will seriously affect the branch office system of doing business, and curtail and limit the business of large national concerns operating through branch offices. Petitioner states that for that reason the decision is of vital importance, and should not be allowed to stand. Respondent respectfully urges that there are other matters involved in this lawsuit which are of greater importance. This becomes apparent upon the broad general ground of public policy when it is considered that the petitioner's lawsuit is based upon a forged surety bond given to secure a forged promissory note purportedly executed by a corporation whose corporate existence had ceased long prior to the date of the execution, and which bond is alleged to have been confirmed by a forged letter written upon the forged letterhead and water-marked stationery of the respondent. The whole transaction is so permeated with fraud and illegality that to allow a recovery upon those documents would in the respond-

ent's opinion be of much greater importance upon the basis of public policy.

The courts have not been prone, and should not be prone to support and breathe life into illegal and forged documents. The Supreme Court of Missouri has expressed itself along those lines in the case of *McDearmott* v. *Sedgwick*, 140 Mo. 172, in which it was said, l. c. 181, 182:

> "The principle is well settled that no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. This is a principle founded upon public policy. Not for the sake of the defendant, but for the law's sake, and that alone. *Attaway* v. *National Bank*, 92 Mo. 485; *Sprague* v. *Rooney*, 104 Mo. 360; *Atlee* v. *Fink*, 75 Mo. 102."

In the case of *Miller* v. *Bowen Coal & Mining Co.*, 40 S. W. (2d) 485 (Mo. App.) plaintiff sought to recover moneys due him under his mining contract, and for rental alleged to be due him under said contract for a railway switch placed on the surface of the lands covered by the contract by the defendant. By answer the defendant set up the defense that plaintiff being merely a life tenant had no authority to make the alleged contract sued upon, and that the same was invalid and unenforceable. The Court of Appeals held that the mining lease was illegal for the reason that plaintiff being a life tenant could not legally open mines or lease the lands for that purpose, and thus destroy the value of the remainder. The Court said, l. c. 489:

> "There can be no doubt that the lease was illegal, nor is there any doubt that the law refuses aid to a litigant who bases his cause of action upon an immoral or illegal transaction."

The Court again said in this decision, l. c. 490:

> "We think the contract or lease is so infected with illegality as to render it entirely unenforceable. Its performance involved the perpetration of a positive wrong and was prohibited by law."

In the case of *State ex rel.* v. *Globe Indemnity Co.*, 29 S. W. (2d) 743, it was said, l. c. 748:

> "Where fraud enters into a transaction it permeates and taints it throughout and reaches from the act to the resulting consequence."

We therefore urge that the decision of the Circuit Court of Appeals in denying recovery upon these illegal and forged documents followed the broad general principles as laid down in the above cases, and their decision was proper upon the grounds of public policy.

We do not believe that the opinion of the Circuit Court of Appeals in any way affects the transaction of business by national concerns through branch offices.

The petitioner in seeking to establish the importance of the question presented states that under the decision of the Circuit Court of Appeals a local patron would be bound to inquire of the home office whether the local manager had authority to transact a particular kind of business. The petitioner doubtless had some question in his mind as to the authority of Nye, the branch office manager at Washington, D. C., to execute such a bond as he contemplated acquiring. He made inquiry of the home office concerning Nye's authority. Likewise the escrow agreement provided that the purchase money of the note should not be turned over until the bank had received "direct advice from the American Surety Company of New York, New York, saying that

this bond is authorized and that they recognize their liability under said bond to W. F. Coen." (Tr. of Rec. p. 85).

CONCLUSION.

In conclusion it is respectfully submitted that the Circuit Court of Appeals did not decide important questions of local law in a manner in conflict with local decisions, and that the petition for certiorari should be denied.

Respectfully submitted,

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